COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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B-131836 June 5, 1973

The Honorable John W. Warner
The Secretary of the Navy

Dear Mr. Secretary:

We refer to letter dated March 30, 1973, from the Under Secretary of the Navy, in response to our letter of February 9, 1973, in which we requested an expression of your views concerning the propriety of payment under 37 U.S.C. 427(b)(2) of family separation allowance (FSA) to about 230 members on three ships which have been or are being overhauled at the Norfolk Naval Shipyard in Portsmouth, Virginia, located about 3 miles from Norfolk, Virginia, the home port of the ships.

In our letter we stated that none of these members' families reside in the Norfolk area and that when they were assigned to the ships the members had the option of moving their families at Government expense to the Norfolk area, but chose not to do so. While the ships were at Norfolk such members had no entitlement to FSA, but were paid the allowance for the period when the ships to which they were assigned were being overhauled in Portsmouth. We pointed out that those members who had moved their families to Norfolk, the home port of the ships, did not receive the allowance and it was further pointed out that had the other members moved their families to the Norfolk area they too would not have been entitled to the allowance while their ships were at Portsmouth for overhaul since they still would have been within easy commuting distance of their families.

In our letter we referred to two of our decisions, 43 Comp. Gen. 444 (1963) and 43 Comp. Gen. 527 (1964) in which we held, contrary to an earlier decision, 43 Comp. Gen. 332 (1963), that a member whose dependents do not reside at or in the vicinity of the home port would be entitled to FSA, if otherwise qualified, when the member's vessel is away from its home port and there results a separation of the member from his dependents by reason of his military assignment.

It was noted, however, that the decisions did not consider the situation of a short move of the vessel in the vicinity of the home port such as the movement from Norfolk to Portsmouth. Since no entitlement to the allowance resulted in the case of dependents

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residing in the vicinity of Norfolk, the view was expressed that members whose dependents did not reside in that vicinity had no greater right.

In his letter of March 30, 1973, the Under Secretary has expressed the view that under the governing law and regulations the payments of the allowance to the involved members are believed to be correct provided they are otherwise entitled thereto. He says that there is no question that a member of eligible pay grade and "with dependents" who is on duty on board ship away from the home port of the ship for a continuous period of more than 30 days is entitled to the allowance, if otherwise entitled, even though the ship is "away from the home port" only as far as a nearby port. In this connection, he adds that 37 U.S.C. 427(b)(2) uses the words "the home port" and does not address or open consideration of a term such as vicinity or proximity.

The Under Secretary also explains that the entitlement of a member must additionally be examined under the provisions of paragraph 30313 of the Department of Defense Military Pay and Allowances Entitlements Manual which states in pertinent part that "FSA does not accrue to a member if all of his dependents reside at or near his duty station" and also establishes guidelines of either a distance (one way) of 50 miles as a reasonable commuting distance or a time of 1 1/2 hours required to commute one way as the basis for determining whether the dependents reside near the duty station.

The Under Secretary further says that the governing law would appear to have contemplated that the fact of a member being on duty on board ship away from its home port for a continuous period of more than 30 days did create and constitute a Government-enforced family separation. And, he points out that clause (2) of 37 U.S.C. 427(b) is the only one of the three clauses under that subsection which does not contain the phrase "and his dependents do not reside at or near * * *". In view thereof he expresses the belief that Congress contemplated the absence of the ship from the home port as creating the Government-enforced separation and did not intend that the member's decision regarding where he located his family would enter the entitlement determination. This view, he states, is supported by our decision, 43 Comp. Gen. 444 (1963), in which it was determined that a Navy member who maintains a residence for his family in San Francisco while assigned to a ship with its home port at San Diego is entitled to the allowance when the vessel is away from that home port for more than 30 days.

In commenting on the effect of the above-mentioned paragraph 30313 of the Department of Defense Military Pay and Allowances Entitlements

Manual the Under Secretary also expresses the view that if some eligible members on board ship in Portsmouth had moved their dependents to the area, but to a point outside that described by a 50-mile radius or 1 1/2 hours one-way travel time from the ship, when away from the home port, they would be eligible to receive the allowance. On this basis, he asserts that if the ship on which a member was on board at Portsmouth had gone to a port in Maine for 30 days or more, his entitlement to the allowance would have to be examined under the same time and distance rules with regard to his dependent's residence.

Additionally, the Under Secretary contends that a hardship would be inflicted on Navy members under the views expressed in our letter of February 9, 1973. He refers to an eligible member who receives orders to a ship which at that time is scheduled to be deployed from its home port a majority of the time during the member's prospective tour. On this information, the member utilizes his dependent transportation entitlement to move his family to an area which is judged better for his family during prolonged absences and which is away from the home port. Upon reporting to the ship, the member finds that the schedule has changed and the ship will be undergoing overhaul in a yard outside of, but close by, the home port. The Under Secretary says that a decision made by the member because of prospective Government-enforced separation has now created a situation in which any change to the current entitlement would presumably not allow payment of the allowance. This, he asserts, would work a hardship on the member and would be an inequitable interpretation of the law.

We now understand that the propriety of payment of FSA to members assigned to a vessel homeported at Norfolk but at the Portsmouth Naval Shipyard for a period in excess of 30 days was considered by the Comptroller of the Navy in 1967. It is our understanding that he concluded that if the member's dependents resided at a place other than the home port and the distance exceeded a reasonable commuting distance (50 miles one-way), payment was authorized unless the member actually commuted to the residence of his dependents.

In decision of January 30, 1964, 43 Comp. Gen. 527, we rejected a Navy proposal to deny FSA under 37 U.S.C. 427(b)(2) when the ship to which a member is attached moves from the home port to another location within a 50 mile radius. We said that--

> * * * Unlike the restrictive dependent residence provision in clauses (1) and (3) of section 427(b), clause (2) contains no express language which would restrict or qualify the payment of the allowance on

> the basis of where dependents reside. Hence, we are dubious that there is adequate basis for a rule which, for purposes of payment of the allowance under clause (2), which would make a distinction between cases where the member's ship is less than 50 miles from its home port and cases where it is more than 50 miles from the home port. It is our view, however, as indicated in our decision of October 9, 1963 [43 Comp. Gen. 332] and for the reasons stated therein, that the allowances authorized by all three clauses under subsection (b) are "predicated on a separation of the member from his dependents by reason of his military assignment and is designed to reimburse him for the additional expenses that arise [at the place] where his dependents reside by reason of his separation from them."

Thus, the basic question in determining entitlement to FSA is whether there has resulted an enforced separation of the member from his dependents by reason of his military assignment. Contrary to the opinion of the Under Secretary no entitlement exists if the member's vessel moves to a nearby port and the member can continue to reside with his dependents.

Paragraph 30313 of the Department of Defense Military Pay and Allowances Entitlements Manual, referred to by the Under Secretary, reflects our affirmative answer to question 26 in 43 Comp. Gen. 332, 353, as follows:

> If the dependents of a member do not reside within a reasonable daily commuting distance of his duty station, a distance of 50 miles being considered as the maximum one-way distance for this purpose except where a member actually commutes a greater distance daily, may it be considered that his dependents do not reside at or near his station for the purpose of clause (1) of 37 U.S.C. 427(a) or clause (1) and (3) of 37 U.S.C. 427(b)?

Paragraph 30313 also reflects the decisions in the cases of Cenida v. United States, 193 Ct. Cl. 262 (1970) and Tasker v. United States, 178 Ct. Cl. 56 (1967) holding that the members were entitled to family separation allowance under section 427(b)(1) where the dependents resided about 25 miles from the members' duty stations but the circumstances were such that commuting was not feasible because of poor roads and the lack of transportation.

It will be noted that clause (1) of subsection 427(a) and clauses (1) and (3) of subsection 427(b) authorize FSA in circumstances where transportation of dependents to the member's duty station is not authorized at Government expense and his dependents do not reside at or near such station.

Since payment of family separation allowance incident to duty aboard a vessel is governed by clause (2) and since Norfolk is not a restricted station, transportation of dependents to that station being authorized at Government expense in otherwise proper cases, paragraph 30313 of the manual appears to have no application in the case of members assigned to vessels homeported there. Consequently, that paragraph of the regulations provides no basis to pay FSA to a member who, for personal reasons, has elected to locate his dependents away from such home port.

As indicated above, we have held that a member is not precluded from receiving FSA by reason of the fact that he does not move his dependents to the vicinity of the home port, as he is authorized to do at Government expense. These decisions were intended to authorize the allowance on substantially the same basis as is authorized for members whose dependents reside at the home port. However, it was not intended that a member who elected not to bring his dependents to reside at the home port would be in a more favorable position than the member who moved his dependents to the home port.

As we have indicated, the allowances authorized in all three clauses under subsection 427(b) are predicated on a separation of the member from his dependents by reason of his military assignment. When the vessels involved were moved from Norfolk to Portsmouth there was not such a separation of the members and their dependents residing at Norfolk as would entitle them to the allowance. Likewise, no such separation resulted in the case of dependents who reside away from the home port.

While the Under Secretary maintains that to deny FSA in the circumstances involved "would work a hardship on the Navy member and would be an unwarranted and inequitable extension of the FSA law," it is pointed out that, on the other hand, the unjustified payments of the allowance to the members whose dependents do not reside in the Norfolk area are tantamount to a "windfall" since the other members on the same ships whose dependents resided in that area are legally precluded from receiving the allowance.

Furthermore, the fact that the member may have expected extended sea duty when he located his dependents away from the home port provides no basis for payment of the allowance. Frequent changes in duty assignments, often on short notice, is an incident of duty in the armed services. A member has no vested right to allowances which might have accrued if his anticipated assignment had not been changed.

In view of the foregoing, we find no legal basis for the payments of FSA incident to the movement of the vessels from Norfolk to Portsmouth. Therefore, such payments should be discontinued immediately. Inasmuch as there is evidence of record, as indicated above, to show that the Comptroller of the Navy misinterpreted our decision, 43 Comp. Gen. 527, no action need be taken to collect the improper payments already made if they were correct in other respects. These payments presumably were accepted in good faith by the members and, in any event, they apparently would be proper for waiver under the provisions of 10 U.S.C. 2774.

Sincerely yours,

PAUL G. DEMBLING

For the Comptroller General
of the United States